APPENDIX

ITEM:		PAGE NO.
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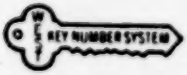
141(6)(a), Florida Statutes (1977),[5] because the findings that directly follow the initial finding also concern lack of mitigating circumstances. The trial judge properly differentiated mitigating from aggravating circumstances in negating the statutorily described mitigating circumstance.

[5] Finally, appellant claims that the trial judge limited jury consideration of nonstatutory mitigating circumstances by giving the standard jury instruction which states: "The mitigating circumstances which you may consider, if established by the evidence, are these . . . ." We have previously considered this argument in depth and have flatly rejected it. *See Peek v. State*, 395 So.2d 492, 496-97 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). *See also Demps v. State*, 353 So.2d 501, 505 (Fla.1981).

Having found no merit in any of appellant's arguments, and having conducted a full review of the sentence which found several aggravating and no mitigating circumstances, we are unable to discern any error that may have deprived appellant of any protections offered by the judicial process. Accordingly the sentence of death is affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.



5. "The defendant has no significant history of prior criminal activity."

William Riley JENT, Appellant,

v.

STATE of Florida, Appellee.

No. 58744.

Supreme Court of Florida.

Dec. 3, 1981.

Rehearing Denied Feb. 15, 1982.

Defendant was convicted before the Circuit Court, Pasco County, Wayne L. Cobb, J., of first-degree murder and sentenced to death, and he appealed. The Supreme Court held that: (1) defendant, who otherwise adequately cross-examined eyewitnesses, failed to present sufficient predicate for access to the witnesses' grand jury testimony; (2) although State conceded that its witnesses were not pillars of the community, reviewing court was not required to reweigh the evidence; (3) there was no abuse of discretion in allowing hair analysis testimony; (4) defendant failed to show prejudice of constitutional dimension due to presence of cameras in courtroom during trial; (5) in view of recantation of statements in affidavits, it was not abuse of discretion to deny new trial on ground of new evidence; and (6) the aggravating circumstances, for imposition of death penalty, that homicide was committed in a cold, calculating and premeditated manner without pretense of moral or legal justification is not an unconstitutional attempt to govern practice and procedure and does not improperly place a burden of proof on defendant.

Affirmed.

1. Criminal Law ⇐627.9(1, 5)

There is no pretrial right to inspect grand jury testimony as an aid in preparing one's defense, and holding an in camera inspection of such testimony is within the trial court's discretion. West's F.S.A. §§ 905.27, 905.27(1).

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2. Criminal Law ⇐627.9(1)

To obtain access to grand jury testimony a proper predicate must be laid. West's F.S.A. §§ 905.27, 905.27(1).

3. Criminal Law ⇐627.9(4)

Mere surmise or speculation regarding possible inconsistencies in testimony is not a proper predicate for securing access to grand jury testimony. West's F.S.A. §§ 905.27, 905.27(1).

4. Criminal Law ⇐627.9(4)

Where, through cross-examination, defense counsel drew attention to inconsistencies between eyewitnesses' trial testimony and prior depositions, the defense failed to present a sufficient predicate for access to grand jury testimony, which was sought for impeachment purposes, and trial judge did not abuse his discretion in denying the request. West's F.S.A. §§ 905.27, 905.27(1).

5. Indictment and Information ⇐189(8)

Accessory after the fact is not a lesser included offense of premeditated murder.

6. Criminal Law ⇐586

A continuance may be granted in a trial court's discretion, but only for good cause shown. West's F.S.A. Rules Crim. Proc., Rule 3.190(g)(2).

7. Criminal Law ⇐1151

Trial court's ruling on request for a continuance will not be disturbed unless a palpable abuse of discretion is demonstrated. West's F.S.A. Rules Crim.Proc., Rule 3.190(g)(2).

8. Criminal Law ⇐594(1), 627.2

There was no abuse of discretion in denial of motion for continuance and order requiring an eyewitness, who pled nolo contendere of accessory after the fact to homicide, to submit to deposition where trial court found that witness still had a Fifth Amendment privilege and that the defense had no reason or ground to believe that her testimony would exculpate defendant. West's F.S.A. Rules Crim.Proc., Rule 3.190(g)(2); U.S.C.A.Const.Amend. 5.

9. Criminal Law ⇐641.13(6)

Counsel diligently sought motion for continuance and order requiring eyewitness to submit to deposition and counsel's suffering adverse ruling did not rise to level of ineffective assistance.

10. Criminal Law ⇐1159.4(2)

Although the State conceded that its witnesses were not pillars of the community, the reviewing court would not reweigh the evidence to determine its sufficiency to support conviction as determining credibility of witness is within the province of the jury and it is within jury's duty to resolve conflicts and absent a clear showing of error its findings will not be disturbed.

11. Criminal Law ⇐388

As a general rule, the problem presented to a trial court is whether scientific tests are so unreliable and scientifically unacceptable that admission of those test results constitutes error.

12. Criminal Law ⇐1153(1)

A trial court has wide discretion concerning the admissibility of evidence and, absent abuse of discretion, a ruling regarding admissibility will not be disturbed on appeal.

13. Criminal Law ⇐472

There was no abuse of discretion in allowing hair analysis testimony and substance of that testimony was not out of order where technician repeatedly stated that she could not positively identify the unknown hair, which was found at scene, as being defendant's.

14. Criminal Law ⇐633(1)

To have cameras excluded from a courtroom during trial a defendant must show prejudice of constitutional dimensions.

15. Criminal Law ⇐1166.11

Defendant, claiming that trial court erred in denying motion to exclude cameras from the courtroom, failed to show prejudice of constitutional dimension and denial of motion to exclude was not abuse of discretion where only allegation was that clicking of the camera distracted counsel

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thereby denying defendant the effective assistance of counsel and trial judge, while expressing his dislike for presence of cameras, stated that he could not hear any such clicking and that he would grant the motion if, at any time, he found the camera distracting.

16. Indictment and Information ⇐71.2(1)

An indictment must fulfill two requirements: the defendant must be apprised of the charges sufficiently to enable preparation of a defense and the allegations must be specific enough to protect defendant against being placed in jeopardy twice for the same offense.

17. Indictment and Information ⇐101

If deceased's name is unknown, a homicide indictment must give as clear a description of the person as the facts before the grand jury permit.

18. Indictment and Information ⇐101

Indictment charging defendant with one count of premeditated murder for death of, "Tammy, a white female, (of specified height and weight), a better description of said person to the Grand Jury unknown," sufficiently apprised defendant of the crime charged and called on him to answer for the death of one particular person and no other.

19. Homicide ⇐229

The State proved beyond a reasonable doubt that the person allegedly beaten, raped and burned and the person autopsied were one and the same in view of medical examiner's testimony that she visited scene and observed as police took photograph of victim's body and identified one of those photographs and stated that she performed an autopsy on the person in that photograph, with an eyewitness identifying one of the photographs taken at the scene as being of the victim.

20. Criminal Law ⇐958(6)

Denial of new trial on ground of new and material evidence was not abuse of discretion where, when testifying at hearing, affiants recanted their recitals in affidavit that body identified in indictment and at trial as "Tammy" was, in fact, that of another and that someone other than defendant caused her death and testified that statements on which their affidavits were based were prompted by codefendant's promises that female affiant and her child would be taken care of while male affiant was in jail. West's F.S.A. Rules Crim.Proc., Rule 3.600(a)(3).

21. Homicide ⇐341

Failure to instruct on underlying felony was harmless error in prosecution for first-degree murder where the State "feebly" argued felony-murder but evidence overwhelmingly showed a premeditated murder and defense did not request such instruction and defendant failed to show any prejudice from failure to so instruct.

22. Homicide ⇐351

There is no unconstitutional attempt to govern practice and procedure by virtue of aggravating circumstance, for imposition of death penalty, that capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. West's F.S.A. §§ 921.141, 921.141(5)(i).

23. Homicide ⇐354

Level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in the aggravating circumstance, for imposition of death penalty, that homicide was committed in cold, calculating and premeditated manner. West's F.S.A. §§ 921.141, 921.141(5)(i).

24. Homicide ⇐354

The aggravating circumstance, for imposition of death penalty, that homicide was committed in a cold, calculating and premeditated manner without any pretense of moral or legal justification does not improperly place the burden of proof on a defendant as the state must prove beyond a reasonable doubt the elements of the premeditation aggravating factor. West's F.S.A. §§ 921.141, 921.141(5)(i).

25. Criminal Law ⇐796

Trial court did not improperly limit consideration of mitigating evidence in im-

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posing death penalty where defendant, complaining that the court did not instruct on nonstatutory mitigating evidence, did not request such instruction and, when asked by the court, defense counsel indicated his satisfaction with the court's proposed instructions. West's F.S.A. § 921.141.

Leonard J. Holton, Dade City, and Jerry Hill, Public Defender, and David A. Davis, Asst. Public Defender, Bartow, for appellant.

Jim Smith, Atty. Gen., and Michael J. Kotler, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

William Jent appeals his conviction of first-degree murder and sentence of death. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm both his conviction and sentence.

On July 13, 1979 four men rode on horseback through the Richloam Game Preserve in Pasco County looking for some stray cattle. Instead of the cattle, they found the badly burned body of a young woman. Six weeks later an indictment issued, charging Jent and his stepbrother Ernest Miller[1] with the premeditated murder of a woman named "Tammy."[2]

At trial three eyewitnesses presented an ugly, confused story—a drunken swimming party, the beating of the unknown woman by Jent and his stepbrother, transporting her in the trunk of a car to Miller's home where four men raped her, and placing the woman back in the car trunk and taking her to the game preserve where Jent and Miller poured gasoline on the woman and set her on fire. The medical examiner testified that the victim had been alive when ignited and that burns were the cause of death. The jury convicted Jent as charged, and the trial court sentenced him to death. This appeal followed.

Jent alleges that the trial court erred by failing to provide him with transcripts of the grand jury testimony of three eyewitnesses. Just prior to trial Jent's attorney requested access to this testimony, claiming that the three witnesses' testimony at trial would be inconsistent with what they had told the grand jury.[3] Counsel claimed that the prior testimony would provide impeachment material, to which Jent was entitled under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). After hearing argument, the court found that the defense had not laid a proper predicate for disclosure of grand jury testimony under the exceptions to section 905.27, Florida Statutes (1979).[4]

[1-3] There is no pretrial right to inspect grand jury testimony as an aid in preparing one's defense and holding an in camera inspection of such testimony is a matter within the trial court's discretion. *Minton v. State*, 113 So.2d 361 (Fla.1959). To obtain access to grand jury testimony, a proper predicate must be laid. Mere surmise or speculation regarding possible inconsistencies in testimony is not a proper predicate. *Id.*

[4] The three eyewitnesses testified at Jent's trial. Through cross-examination, defense counsel drew attention to inconsistencies between each one's trial testimony

1. The jury convicted Miller of first-degree murder in a separate trial. In a combined sentencing hearing both Jent and Miller received the death penalty. *Miller v. State*, No. 58,795 (Fla.).

2. Several witnesses referred to the victim as "Tammy." Her name has never been established more definitely.

3. Defense counsel stated that he was not alleging that they would commit perjury.

4. § 905.27(1), which allows disclosure of grand jury testimony for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

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and her previously given depositions.[5] If, as defense counsel stated, he sought the grand jury testimony in order to attack these witnesses' credibility, the cross-examination obviated that need for their prior testimony. We agree that the defense failed to present a sufficient predicate and find that the trial judge did not abuse his discretion in denying the request for access to grand jury testimony.

[5] A few days prior to Jent's trial Samantha Carver, an eyewitness, pled nolo contendere to a charge, arising from the instant homicide, of accessory after the fact. Jent sought to depose Carver, but, on advice of counsel, she invoked her fifth amendment right to remain silent. Jent then moved for a continuance and an order requiring Carver to submit to a deposition.[6] After hearing argument, the trial court denied the motion, finding that Carver still had a fifth amendment privilege, that if her testimony were personally inculpatory she could face other criminal charges,[7] and that the defense had no reasonable grounds to believe that her testimony would exculpate Jent. Jent now claims that the court erred in denying his motion for a continuance, thereby denying him effective assistance of counsel.

[6-9] We find no merit to this claim. A continuance may be granted in a trial court's discretion, but only for good cause shown by the party seeking the continuance. Fla.R.Crim.P. 3.190(g)(2). The trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. *Magill v. State*, 386 So.2d 1188 (Fla.1980), *cert. denied*, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981). No such showing has been made in the instant case. Additionally, Jent's counsel diligently pursued the matter, and his suffering an adverse ruling does not rise to the level of ineffective assistance of counsel.

Jent also challenges the sufficiency of the evidence to convict him of murder. He alleges that the quality of the evidence is so poor that it fails to establish his guilt beyond a reasonable doubt and asks this Court to reweigh the evidence as it did in *Tibbs v. State*, 337 So.2d 788 (Fla.1976). In making this claim Jent did not have the benefit of our second *Tibbs* opinion in which we receded from the case on which he relies. *Tibbs v. State*, 397 So.2d 1120 (Fla.1981). In the latter *Tibbs* we reaffirmed this Court's previous conclusion in *State v. Smith*, 249 So.2d 16 (Fla.1971), that, when a jury properly performs its duty, a reviewing court should not reweigh the evidence.

[10] The state concedes that its witnesses were not pillars of the community. Determining the credibility of witnesses, however, is within the province of the jury. It is the jury's duty to resolve factual conflicts, and, absent a clear showing of error, its findings will not be disturbed. *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1229 (1976); *Spinkellink v. State*, 313 So.2d 666 (Fla.1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Our review of the record convinces us that the jury performed its function properly and that its verdict is supported by competent, substantial evidence.[8]

When the body was found, the victim's head was resting against a small stump, which a detective uprooted and had examined. Laboratory technicians found several hairs on the stump, some of which came from the victim and one of unknown origin. The technician who performed a microanalysis of the hairs testified at trial. During the proffer of her testimony, as well as

5. Each of the three witnesses had given two depositions. Any inconsistencies do not rise to the favorable evidence level of *Brady*.

6. Carver had not been adjudicated and sentenced when the court heard this motion nor had she been granted immunity.

7. The trial court correctly concluded that accessory after the fact is not a lesser included offense of premeditated murder. *See Palmes v. State*, 397 So.2d 648 (Fla.1981).

8. We find no merit in Jent's contention that the trial court erred in not finding "weakness" of the evidence as a mitigating factor in the sentencing proceeding.

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during direct and cross-examination, she testified that the unknown hair was microscopically the same as Jent's and that it was "highly likely" that the unknown hair and the samples of Jent's hair that she had examined had come from the same source. In response to questions from both sides regarding positive identification, however, she repeatedly stated that the unknown hair could not positively be identified as having come from Jent.[9]

Defense counsel objected to testimony regarding hair analysis on the ground that such analysis is not sufficiently reliable or exact to be allowed into evidence. The state countered the objection by claiming that hair analysis is a recognized scientific procedure and that the defense's argument went to the weight to be given the testimony, not to its admissibility. The trial judge stated that the reliability of microanalysis was a determination for the court to make. After the proffer of the technician's testimony and argument by both sides, the court overruled the defense's objection and allowed the testimony into evidence.

[11-13] As a general rule, the problem presented to a trial court is whether scientific tests are so unreliable and scientifically unacceptable that admission of those test results constitutes error. *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970). This Court has recognized that testimony regarding hair analysis can be admitted into evidence in a criminal trial. *Peek v. State*, 395 So.2d 492 (Fla.1980). A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. *See Mikenas v. State*, 367 So.2d 606 (Fla.1978); *Rodriguez v. State*, 327 So.2d 908 (Fla. 3d DCA 1976); *Coppolino v. State*. We find no abuse of discretion in regards to allowing hair analysis testimony in the instant case, nor do we find the substance of that testimony out of order. The technician repeatedly stated that she could not positively identify the unknown hair as being Jent's. Determining what weight to accord this testimony was within the jury's province, and no error occurred in permitting the jury to hear this testimony.

[14] Jent claims that the trial court erred in denying his motion to exclude cameras from the courtroom during his trial. Neither the United States Supreme Court nor this Court has found the presence of cameras in a courtroom to constitute a per se denial of due process. *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981); *In Re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla.), *appeal dismissed*, 444 U.S. 976, 100 S.Ct. 476, 62 L.Ed.2d 403 (1979). In order to have cameras excluded from a courtroom during trial, a defendant must show prejudice of constitutional dimensions. *Compare Clark v. State*, 379 So.2d 97 (Fla.1979), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981), *with State v. Green*, 395 So.2d 532 (Fla.1981).

[15] Jent's only allegation regarding this claim is that the clicking of the camera distracted his attorney, thereby denying him the effective assistance of counsel. The trial judge, while expressing his dislike for the presence of cameras, stated that he could not hear any such clicking. He also stated that he would grant the motion if, at any time, he found the camera distracting. The motion was never granted, so, obviously, the court never found the camera so distracting as to necessitate its removal. We find that Jent has not shown prejudice of constitutional dimensions and that the trial judge did not abuse his discretion in refusing to grant the motion.

Jent alleges error on two points regarding the victim's identity. He first claims

9. "[E]xcept in rare instances, there are not enough individual characteristics in hair from which to determine positively that a hair of unknown source came from a particular person to the exclusion of all other persons." A. Moenssens & F. Inbau, Scientific Evidence in Criminal Cases 412 (1978) (footnote omitted). This Court acknowledged that conclusion in *Peek v. State*, 395 So.2d 492 (Fla.1980).

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that the indictment did not sufficiently describe one certain person [10] and that the trial court erred in failing to grant his motion to dismiss the indictment. Jent's second point is that the state failed to prove beyond a reasonable doubt that the person allegedly beaten, raped, and burned and the person autopsied were one and the same.

[16–18] We agree with the state that no error occurred regarding the victim's identity. An indictment must fulfill two requirements: the defendant must be apprised of the charges sufficiently to enable preparation of a defense, and the allegations must be specific enough to protect the defendant against being placed in jeopardy twice for the same offense. *State v. Black*, 385 So.2d 1372 (Fla.1980). If the deceased's name is unknown, the indictment must give as clear a description of the person as the facts before the grand jury permit. *Johnson v. State*, 60 Tex.Crim. 305, 131 S.W. 1085 (1910). *See Commonwealth v. Di Stasio*, 294 Mass. 273, 1 N.E.2d 189 (1936). We find that the indictment sufficiently apprised Jent of the crime charged and that it called him to answer for the death of one particular person and no other.

[19] We also find that the person described in the indictment was the person autopsied. At trial the medical examiner testified that she visited the scene and observed as police took photographs of the victim's body. She identified one of those photographs and stated that she had performed an autopsy on the person in that photograph. One of the eyewitnesses to the entire sequence of events identified one of the photographs taken at the scene as being of "Tammy," the victim. We find that the state introduced convincing, satisfactory, unequivocal proof, compatible with the nature of this case, that sufficiently identified the victim. *See Raulerson v. State*, 358 So.2d 826 (Fla.), *cert. denied*, 439 U.S. 959, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978).

[20] Following his conviction, Jent moved for a new trial, alleging, inter alia, the discovery of new and material evidence.[11] After holding a hearing concerning the newly discovered evidence, the trial court denied the motion. Jent now claims that the trial court erred in denying his motion for new trial.

The motion was predicated on affidavits [12] signed by Elmer Carroll and his girlfriend Tina Marvin, both former residents of Dade City. Carroll's affidavit stated that he witnessed the beating death of a woman named Gail Bradshaw and the subsequent burning of her body. According to the affidavit, this murder took place in the Richloam Game Preserve on July 12, 1979. Marvin's affidavit stated that Carroll related the facts of Bradshaw's death to her.

At the hearing, defense counsel contended that the body identified as "Tammy" was, in fact, that of Gail Bradshaw and that someone other than Jent caused her death. Bradshaw's father, sister, and brother testified at the hearing. Only the brother identified photographs of the body as being his sister.

Elmer Carroll and Tina Marvin also testified at the hearing. On the stand, however, they recanted the statements made in their affidavits. Carroll testified that he was not at the game preserve on July 12 and that he saw nothing violent happen to Bradshaw. When shown a photograph of the body found at the game preserve, he said that it was not Bradshaw. Marvin, when questioned by defense counsel, again stated that Carroll told her that Bradshaw had been killed. On cross-examination, however, she retracted that statement and said that Car-

10. The indictment charged Jent with one count of premeditated murder for the death of "Tammy, a white female, 5' 06" in height, and weighing approximately 120 pounds, a better description of said person to the Grand Jury unknown."

11. New and material evidence which, if introduced at trial, would probably have changed the verdict is a ground for granting a new trial. Fla.R.Crim.P. 3.600(a)(3).

12. We note that a state attorney was not present at the interviews which produced these affidavits and that neither Carroll nor Marvin was represented by counsel during the interviews.

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roll had never told her that Bradshaw had been taken to the game preserve and killed. Further questioning by the state produced the following dialog:

Q Well, then why did you sign an affidavit to that effect swearing that was the truth?

A I was just doing it for Mr. Hersch [Miller's attorney].

Q Why did you do that?

A To help him out I guess.

Q Why did you think you should help him out?

A Because he said he would stand by me all the way.

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[Meaning] he would stand beside me and he also said that he would give me a lawyer.

Both Carroll and Marvin testified that the statements on which their affidavits were based were prompted by Miller's promises, either in person or through his sister, to Carroll and Marvin, respectively, that Miller would see that Marvin and her child were taken care of while Carroll was in jail.

After hearing all the testimony, the trial judge denied the motion for new trial. The judge stated that he did not think a jury would believe Carroll and Marvin's testimony. He stated further that he believed that a jury, if it heard their testimony, would still render the same verdict.

As this Court has previously stated:

In deciding a motion for new trial on the ground of newly discovered evidence, the trial judge must weigh both the evidence adduced at the first trial, and the evidence offered on the motion, in order to determine whether the newly discovered evidence "if introduced at the trial would probably have changed the verdict." Accordingly, the "trial judge has a wide discretion in the matter of granting or denying [motions for new trial] which we will not overthrow unless some abuse is shown." Only very rarely should the trial court's determination be disturbed.

Baker v. State, 336 So.2d 364, 370 (Fla.1976) (citations omitted); *Clark v. State*, 379 So.2d 97 (Fla.1979), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981). After reviewing the record, we find that this case is not one of the rare instances where the trial court's determination should be disturbed. We understand the trial judge's conclusions regarding the incredibility of Carroll and Marvin's statements and testimony and find no abuse of discretion in his ruling.

The indictment charged Jent with one count of premeditated murder. During the trial, one witness testified that the victim had been raped, and the state mentioned that fact several times during closing argument. The court gave the jury the standard instruction on first-degree murder, which includes a felony-murder charge. The court did not, however, instruct on the underlying felony of rape. Defense counsel did not object to this omission, but, rather, concurred in the proposed instructions after examining them.

[21] In his motion for new trial Jent alleged that the court erred in failing to instruct on the underlying felony. The court, however, found Jent's reliance on *State v. Jones*, 377 So.2d 1163 (Fla.1979), and *Robles v. State*, 188 So.2d 789 (Fla. 1966), to be misplaced. The court concluded that those cases did not control the instant situation because the evidence showed an incidental rape during the commission of a premeditated murder rather than an incidental murder during the perpetration of a rape. Relying on *Frazier v. State*, 107 So.2d 16 (Fla.1958), the court found no error regarding the felony-murder instruction.

On appeal Jent again alleges error in that instruction. "Where there is sufficient evidence of premeditation, the failure to give the underlying felony instruction, where it has not been requested, is not error which mandates a reversal absent a showing of prejudice." *Knight v. State*, 394 So.2d 997, 1002 (Fla.1981). In reaching this conclusion we, as did the trial court, relied on *Frazier*. We find that the trial court properly found the failure to instruct on the underlying felony harmless. As the trial court pointed

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out, the state "feebly" argued felony murder; the evidence, however, overwhelmingly shows premeditated murder. The defense did not request such an instruction, and Jent has failed to show that any prejudice resulted from the failure to instruct on the underlying felony.

At the conclusion of the sentencing hearing, the jury recommended that Jent receive the death penalty. The trial court agreed with this recommendation, finding nothing in mitigation, but finding in aggravation that the homicide was especially heinous, atrocious, and cruel and that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.[13] On appeal Jent claims (1) that subsection 921.141(5)(i), Florida Statutes (1979), is an unconstitutional attempt to govern practice and procedure, (2) that the new aggravating factor improperly places a burden of proof on a defendant, and (3) that the trial court improperly restricted the consideration of mitigating evidence. We find no merit to any of these claims.

[22] In *Dobbert v. State*, 375 So.2d 1069 (Fla.1979), *cert. denied*, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980), the appellant attacked section 921.141 in its entirety as an unconstitutional incursion into this Court's power over practice and procedure. We found that claim to have no merit and find no differently regarding the instant claim.

[23, 24] Regarding Jent's second sentencing claim, he alleges that every person convicted of premeditated murder will start the sentencing proceeding with one aggravating circumstance already established. This, Jent argues, will violate due process by forcing the defendant to prove lack of premeditation in the sentencing phase of the trial. We do not agree that this will occur. As we stated in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), the aggravating circumstances set out in section 921.141 must be proved beyond a reasonable doubt. The level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor—"cold, calculated ... and without any pretense of moral or legal justification."

[25] After reviewing the record, we find that the trial court did not improperly limit consideration of mitigating evidence. Jent complains that the court did not instruct the jury on nonstatutory mitigating evidence, but he did not ask the trial court to give the instruction he now propounds to this Court. In fact, when asked by the trial court, defense counsel indicated his satisfaction with the instructions that court proposed to give.

Finding no error, we affirm both the conviction and sentence of death.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.



13. § 921.141(5)(i), Fla.Stat. (1979). The court commented that, on the facts of this case, these two circumstances "seem to blend into one" and appears to have considered them as only a single aggravating factor. In the absence of mitigating factors, finding only a single aggravating factor is sufficient to warrant imposition of the death penalty. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

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Supreme Court of Florida

MONDAY, FEBRUARY 15, 1982

WILLIAM RILEY JENT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 58,744

Circuit Court No. 79-847
(Pasco)

Upon consideration of the Motion for Rehearing filed in the above styled cause by the attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Joseph E. Pittman, Clerk
Hon. Wayne L. Cobb, Judge

David A. Davis, Esquire
Michael J. Kotler, Esquire

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SECTION 921.141, FLORIDA STATUTES (1979)

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

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(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defenant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

RECEIVED
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SUPREME COURT, U.S.

Case No. 81 6549

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RILEY JENT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, WILLIAM RILEY JENT, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: _____
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals
Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813) 533-6715 or 533-1184

COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RILEY JENT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, WILLIAM RILEY JENT, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted on December 20, 1980, in the Circuit Court for Pasco County, Florida, for first degree murder, in a jury trial.

2. I received a sentence of death for first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed my conviction and sentence.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state court proceedings.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

William R. Jent
WILLIAM RILEY JENT

Subscribed and sworn to
before me this 14th day
of ~~March~~ APRIL, 1982.

Notary Public

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 1, 1982

81 6549

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for WILLIAM RILEY JENT, the Petitioner, hereby certify that on March 15, 1982, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion For Leave To Proceed In Forma Pauperis with attached Affidavit on each of the parties as follows:

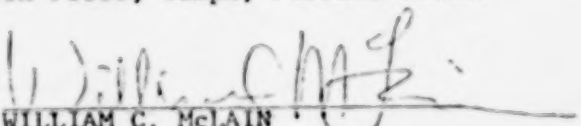
On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Robert Landry, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: _____
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for WILLIAM RILEY JENT, the Petitioner, hereby certify that on March 15, 1982, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Petition For Writ of Certiorari To The Supreme Court of Florida with attached Appendix on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Robert Landry, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals